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In the Supreme Court of the United States

October Term 1970

No. 400

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART AND JUNE BOGART,

Plaintiffs-Appellants,

vs.

EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, et al; THOMAS C. LYNCH, individually and as Attorney General of the State of California; THE PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California,

Defendants-Appellees.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN D. MAHARG,
County Councel

DONALD K. BYRNE,
Assistant County Counsel

LEONARD BLACK,
Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
Attorneys for Appellees.

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Plaintiffs-Appellants,

vs.

EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, et al; THOMAS C. LYNCH, individually and as Attorney General of the State of California; THE PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California,

Defendants-Appellees.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for Respondents EVELLE J. YOUNGER; THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is set forth in Appendix "B" of the Petition. The opinion of the Court of Appeals for the Ninth Circuit and the concurring opinion are set forth in Appendix "A" of the petition. The order modifying the original opinion of the Court of Appeals is set forth in Appendix "A" of this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, absent First Amendment circumstances, the Federal District Court should assume Equitable Jurisdiction for the purpose of granting declaratory and injunctive relief in an ongoing state criminal proceeding.

2. Whether defendants Board of Supervisors of the County of Los Angeles, the Superior Court of the State of California for the County of Los Angeles, and Evelle J. Younger as District Attorney of the County of Los Angeles are immune from suit for damages under 42 U.S.C. 1983.

3. Whether there is a reasonable nexus between the exclusion of certain professionals (including attorneys) from jury service and the recognized state in-

terest of shielding certain professional groups from interference that would result from such service?

STATUTES INVOLVED

The Los Angeles Superior Court Rule 29 [Grand Jury] Section 2. Nomination by Judges, each November has been amended to delete the following provision:

> "(b) Spouses of judges and Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice shall not be nominated for grand jury service."

STATEMENT OF THE CASE

This action arises out of a complaint for a preliminary injunction, declaratory relief and monetary damages filed by petitioners on October 5, 1967, in the Federal District Court for the Central District of California. Petitioners Peter D. Bogart and June Bogart were indicted for grand theft on February 27, 1963. They were subsequently tried and convicted of several counts in their indictment on July 22, 1965. It is these indictments which the Bogarts seek to have enjoined and declared unconstitutional.

As no evidence was taken in the District Court, the case was disposed of on the basis of pleading and affidavits thereto. Petitioners alleged in their complaint that the California State Grand Jury Statutes

and Rule 29 of the Los Angeles Superior Court excluding physicians, lawyers and their wives from grand jury venires were in violation of equal protection and due process and that the separate grand jury indictments charging appellants were void. They also alleged that said pending criminal proceedings were causing irreparable injury to professional standing, reputation and earning power. Their allegations went on to state that the remedy at law was inadequate because to proceed through California appellate tribunals would cause delay, multiplicity and inconvenience. Petitioners asked the district court to enjoin respondents from giving any force or effect to the indictments, to dismiss the indictments and for a decree stating that the method of selecting grand jurors is unconstitutional as applied to petitioners.

Petitioner Peter Bogart alleged in his affidavit that he had been prosecuted for four and three quarter years by the Los Angeles County District Attorney for offenses of which he was not guilty. It was further alleged that the district attorney proceeded by way of grand jury indictment realizing that no honest judge would hear any more of his opinions and complaints. Petitioner also alleged that his license to practice law in the State of California would be suspended upon his conviction and that he could not recover the fees he would lose thereby.

Appellants also filed an affidavit of J. J. Daniels which alleged that Los Angeles County Grand Juries

are composed of older, white, conservative Anglo-Saxon upper income individuals. On February 5, 1968, the Honorable Frances C. Whelan granted respondents motion to dismiss.

On December 2, 1969, petitioners were heard in the United States Court of Appeals for the Ninth Circuit. Inasmuch as Richard Zeichhower, M.D., Theodore Cohen and Susan Cohen abandoned their appeal and as to them the appeal was dismissed. It is from the United States Court of Appeals affirming the District Court's dismissal that this writ is sought.

REASONS FOR DENYING THE WRIT

I

IT IS CONSISTANT WITH THE DECISIONS OF THIS COURT THAT A THREE JUDGE DISTRICT COURT NOT BE CONVENED ABSENT A PRELIMINARY DETERMINATION THAT PETITIONERS COMPLAINT CONTAINS A SUBSTANTIAL FEDERAL QUESTION.

Petitioners' request for an injunction did not merit the convening of a three judge court pursuant to Sections 2281 and 2284 of 28 U.S.C. and the court properly dismissed the complaint. In *California Water Service v. Redding*, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323 (1937), the court clearly pointed out that it was the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of com-

plaint to ascertain whether a substantial federal question is presented, as otherwise the provisions for convening a three judge court are not applicable.

Petitioners failed to raise a substantial federal question as the exemption of lawyers and physicians from jury duty is a reasonable classification. *Rawlins v. Georgia*, 201 U.S. 638, 50 L. Ed. 899 (1906). A reasonable classification of exemptions from jury service will be upheld. *Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118 (1961).

II

THE COURT BELOW IN REFUSING TO INTERVENE IN OUTGOING STATE CRIMINAL PROCEEDINGS ACTED CONSISTENTLY WITH DECISIONAL LAW OF THIS COURT.

Petitioners are currently appealing convictions of grand larceny in the California Appellate Courts. At the time that the complaint was lodged the State criminal process had begun. Where a state criminal process has begun the court has held that federal courts of equity in the exercise of their discretionary power should refuse to interfere with or embarrass proceedings in state courts except in exceptional circumstances. *Douglas v. City of Jeanette*, 319 U.S. 157 (1942); *Stefanelli v. Minard*, 342 U.S. 117 (1951).

Unless first amendment freedoms of expression are threatened or irreparable injury results, ongoing state

criminal proceedings should not be stayed. The recent case of *Bokulich v. Greene*, 394 U.S. 97, 22 L. Ed. 2d 109, 89 S.Ct. 767 (1969) demonstrates that even where the improper constitution of a grand jury is shown the court will not enjoin the issuance of the indictment inasmuch as the appellant could raise any objection to the composition of the jury as a defense. In *Wilson v. Schnettler*, 365 U.S. 381, 81 S. Ct. 632, 56 L. Ed. 2d 620, this court held that when a state courts jurisdiction has first attached and the criminal defendant has a plain and adequate remedy at law relief in Federal District Court is unavailable.

Nor do petitioners fall within the narrow exception carved out of this rule by *Dombrowski v. Pfister*, 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965) and *Zwickler v. Koota*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 610 (1967) which allows federal courts to avoid the abstention doctrine where statutes are attacked on their face as abridging free expression. Petitioners herein are not alleging abridgment of first amendment freedoms.

III

PETITIONERS CITATIONS DO NOT DEMONSTRATE THAT THERE IS ANY CONFLICT BETWEEN THE DECISION RENDERED BY THE COURT BELOW AND DECISIONS BY OTHER CIRCUITS ON THE SAME MATTER.

All of the decisions cited by petitioner save one concern themselves with writs of habeas corpus wherein each petitioner has exhausted his state remedies[1] or these remedies were no longer available to him[2].

The only decision which does not fall within this category is *White v. Crook*, 251 F. Supp. 401, which did not involve an ongoing state criminal proceeding such as the case at bar but in fact was a civil class action by residents of Lowndes County Alabama, seeking injunctive relief to remedy systematic exclusion of negroes from juries.

None of the cases cited by petitioner address themselves to the situation where federal equity jurisdiction is sought to enjoin are ongoing state criminal proceeding.

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[1] *Seals v. Wyman*, 304 F. 2d 53,
Scott v. Walker, 358 F. 2d 561 (1966),
Davis v. Davis, 361 F. 2d 770,
Brooks v. Beto, 366 F. 2d 1 (1966),
Henslee v. Stewart, 311 F. 2d 691 (1963),
United States Ex. Rel. Goldsby v. Harpole, 249 F. 2d 417,
State of Louisiana v. Newton, 343 F. 2d 161 (1965),
Woods v. Munn, 347 F. 2d 948 (1965),
Harris v. North Carolina, 240 F. Supp. 985 (1965).
Note: *Mitchel v. Henslee* cited at 322 F. 2d 16 could not be found in the volume cited by petitioner.

[2] *Labat v. Bennett*, 365 F. 2d 698 (1966).

Consequently, it must be assumed that Federal District Courts are consistant in following *Douglas v. City of Jeannette*, 319 U.S. 157, 87 L. Ed. 1324, 63 S. Ct. 887 (1943), in disallowing federal equitable relief to interfere with ongoing state criminal prosecutions.

IV

THE ISSUE OF IMMUNITY FROM SUIT IN ACTIONS FOR DECLARATORY AND INJUNCTIVE RELIEF HAS BEEN EXPRESSLY SETTLED BY THIS COURT AND CONSISTENTLY APPLIED BY THE FEDERAL COURT SYSTEM.

Petitioners have named the Board of Supervisors in the apparent attempt to include the County of Los Angeles. 42 U.S.C. 1983 expressly provides that only individual "persons" who are shown to have violated the civil rights of another may properly be named as defendants. This has been interpreted to exclude municipalities including counties or their governing boards. *Monroe v. Pape* (1961) 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492. *Dodd v. Spokane County, Washington* (9th Cir. 1968) 393 F. 2d 330. *Nieto v. Cole* (9th Cir. 1963) 320 F. 2d 817. See also *Monell v. City of Aurora* (1961) 365 U.S. 514, 81 S. Ct. 681, 5 L. Ed. 2d 741. *Agnew v. City of Compton* (9th Cir. 1959) 239 F. 2d 226. Cert. denied 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. 2d 910.

Similarly, the Superior Court of the State of California for the County of Los Angeles is not consid-

ered a "person" under 42 U.S.C. 1983. *Handy Cafe, Inc. v. Justices of the Superior Court* (1st Cir. 1957) 248 F. 2d 485; *Serrano v. California*, (9th Cir 1966) 361 F. 2d 474; *Haldon v. Chagnon* (9th Cir. 1965) 345 F. 2d 601.

While it is conceded that District Attorney Evelle J. Younger might be considered a "person" within the meaning of 42 U.S.C. §1983, he is nevertheless immune from this suit in so far as monetary damages are concerned. He is a quasi-judicial officer, vested with the same immunities as are judges, for acts performed within the scope of his duties as district attorney.

Gregoire v. Biddle (2nd Cir. 1949) 177 F. 2d 579. *Robichaud v. Ronan* (9th Cir. 1965) 351 F. 2d 533; *Bowers v. Heisel* (3rd Cir. 1966) 361 F. 2d 581.

The decisive majority of lower federal court decisions therefore confirms that there is little or no ambiguity in the law governing official immunity under the Civil Rights Act. While judicial and quasi-judicial officers enjoy immunity from civil damage suits, the doctrine does not extend to suits that seek equitable relief.

Petitioners additionally assert that this court has not authoritatively ruled on the issue of official immunity. The cases of *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 and *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288, would suggest the contrary. In *Koota* the Supreme Court held

that a district attorney was not immune to an action seeking declaratory and injunctive relief. Federal Courts should not hesitate to grant equitable relief against public officials when the facts of a case so merit. In *Pierson* the court held a judge to be immune from a civil damage action brought against him under the Civil Rights Act. Thus, since the court has affirmatively ruled on the issue of official immunity, further consideration of the issue at this time would be of no practical value.

The cases of *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, and *Zwickler v. Koota* (supra) cited by petitioners in their brief are clearly not controlling in the case at hand. *Monroe* is cited as authority for the proposition that state agents are not immune from a civil damage suit under the Civil Rights Act. In that case Chicago police officers were held civilly liable for unlawfully breaking into plaintiff's home and arresting him. The holding is consistent with the immunity doctrine in that no public official is ever entitled to immunity for acts performed outside the scope of his authority. In the case at bar, both the district court and the court of appeals affirmed that the conduct of respondents on which petitioners base their claim was in the performance of their official duties. *Monroe* is further distinguishable from the present case in that the immunity afforded police officers is more narrow in scope than the immunity enjoyed by judicial and quasi-judicial officers. *Norton v. McShane* (5th Cir. 1964) 332 F. 2d 855.

Petitioner's reliance on *Koota* is likewise misplaced. In their brief petitioners argue that since District Attorney Aaron Koota was not "immune" from suit, Evelle Younger should likewise enjoy no immunity in the present case. This alleged conflict can be easily resolved by noting the factual differences of the two cases. In *Koota* the suit filed against the district attorney sought only declaratory and injunctive relief. Civil damages were not requested. The court is therefore correct in its holding that his official immunity did not shield him against this suit in equity. In the instant case petitioners seek both equitable relief and damages at law. Based upon these facts, the lower court opinion is consistent with *Koota*. The only immunity granted Evelle Younger by the district court was against civil damages. He was never exempted from the equitable jurisdiction of the court. Therefore, insofar as this action pertains to equitable relief, Evelle Younger is no more or less immune from suit than was Aaron Koota.

In conclusion, it is quite obvious that the lower courts were correct in their holding that all of the respondents mentioned herein were either improperly joined as defendants or immune from civil damages pursuant to the Civil Rights Act. Likewise, since it has been clearly demonstrated that petitioners are not entitled to equitable relief, the court were justified in dismissing the complaint.

V

THE COURT OF APPEALS DID NOT INCORRECTLY DECIDE A QUESTION OF SUBSTANTIVE STATE LAW.

A. THE COURT OF APPEALS DECIDED NO QUESTIONS OF STATE LAW.

The petitioners, by their allegation that the Court of Appeals incorrectly decided a question of applicable state law, have apparently misinterpreted the court's opinion. A reading of the opinion reveals that the court did not address itself to any issues of state law. No reference was made to any California statutes or judicial decisions. The court limited itself to a discussion of the issues raised on the District Court level. Thus the only affirmative action taken by the court of appeals was in affirming the lower courts' decision by holding that petitioner's complaint had been correctly dismissed.

B. THE ISSUE OF APPLICABLE STATE LAW HAS BEEN IMPROPERLY RAISED AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Both the Supreme Court and lower appellate courts have consistently adhered to the rule that they will consider only those questions which were raised in the lower court. *Ellis v. Dixon* (1955) 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231; *McGrath v. Manufacturing Tr. Co.*, 338 U.S. 241, 94 L. Ed. 31; *Dann v. United States*, 248 U.S. 390, 76 L. Ed. 356. Neither in their original

complaint nor in their subsequent appellate brief did petitioners allege that state law should be applied in considering the question of immunity from suit. As evidenced by their earlier pleadings, petitioners at all times considered federal law to be controlling in this area. In their petition for certiorari, however, they assert that whether a state and its agencies and officials are suable or immune from suit is to be decided by state law. Clearly the court should not entertain this completely new theory of liability which petitioners have attempted to inject into the lawsuit at this late stage of the proceedings.

C. THE APPLICATION OF STATE LAW TO THE QUESTION OF OFFICIAL IMMUNITY WOULD RENDER THE RESPONDENTS IMMUNE TO A SUIT FOR CIVIL DAMAGES.

Assuming arguendo that petitioners are correct in assuming that substantative state law governs in the area of immunity from suit, respondents are nevertheless exempt from this action to the extent that civil damages are involved.

Likewise, according to both the doctrine established by *Erie v. Tompkins* (1938) 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and 28 U.S.C. §1652, all federal courts situated in California must apply the substantive law of the state in ruling on questions of immunity from suit under the Civil Rights Act. Since all actions grounded on the Civil Rights Act necessarily raise a

federal question and invoke federal court jurisdiction. California state courts never squarely face the issue of immunity in its application to the Act. One is therefore forced to turn to the decisions of federal courts located within California for the only expression of substantive state law on the subject. The decisions of these courts affirm respondents contention that they may successfully invoke the doctrine of immunity.

Federal Courts applying California law have held that the County of Los Angeles and the Superior Court of the State of California are not suable entitees. *Diamond v. Pitchess* (9th Cir. 1969) 411 F. 2d 565. *Pinkus v. Arenberg* (D.C. Calif. 1966) 258 F. Supp. 996; *Shackman v. Arenberg* (D.C. Cal. 1966) 258 F. Supp. 983. *Arnold v. Buslick* (9th Cir. 1964) 339 F. 2d 879 (judicial immunity); *Friedman v. Younger* (D.C. Cal. 1968) 282 F. Supp. 710 (District Attorney).

To conclude, even assuming that petitioners may properly raise the issue of applicable state law at this late date, the foregoing argument shows that the interpretation of California law was not in issue and even if it had been Federal Courts sitting in California have interpreted it in a manner consistent with State substantive law.

VI

THE DECISION OF THE COURT OF APPEALS RAISES NO QUESTIONS OF IMMEDIATE IMPORTANCE THAT EXTEND BEYOND THE FACTS OF THIS PARTICULAR CASE.

The facts of this case clearly demonstrate that it raises no novel issues not heretofore considered by the Supreme Court. The denial of equitable relief by the Court of Appeals was consistent with the decisions of this court and offers a sound basis for the denial of the petition for certiorari. Indeed the Supreme Court has firmly established that a federal court of equity should not enjoin on going state criminal proceedings in the absence of a possible infringement on First Amendment rights or threatened irreparable harm. *Zwickler v. Koota*, (*supra*): *Wilson v. Schnettler*, (*supra*): *Douglas v. City of Jeanette*, (*supra*). Petitioners have not demonstrated that they fall within either exception. It is evident that they have an adequate remedy at their disposal in which to challenge the alleged unconstitutional grand jury indictments. All of petitioners' contentions may be fully aired by appealing their convictions in the state and federal appellate court systems. Petitioner's petition for certiorari is therefore nothing more than a substitute for appeal. A denial of the petition can be grounded on the maxim that federal courts have traditionally refused to exercise their equitable powers as a substitute for available appellate

procedures. *Morton v. Avery* (6th Cir. 1968) 393 F.2d 138; *Booker v. State of Arkansas* (8th Cir. 1968) 380 F. 2d 240. The policy behind this rule lies in the desire of federal courts to avoid deciding criminal appeals on a piecemeal basis.

The decision of the court of appeals was likewise not in discord with the rulings of other federal courts concerning the doctrine of official immunity from suit. Both this court and the clear majority of lower federal courts have consistently held that counties and courts of law are not suable entities within the meaning of the Civil Rights Act. *Monroe v. Pape, supra; Dodd v. Spokane County, Washington, supra; Sires v. Cole, supra; Handy Cafe, Inc. v. Justices of the Superior Court, supra; Pinkus v. Arenbergh, supra.* These same courts have additionally held that both judges and prosecuting attorneys are immune from civil damage suits based upon the above Act. *Pierson v. Ray, supra; Haldane v. Chagnow, supra; U.S. v. Clark, supra; Clark v. State of Washington.*

For the aforementioned reasons, respondents therefore respectfully request that the petition for certiorari be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By DONALD K. BYRNE,
Assistant County Counsel

LEONARD BLACK,
Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
Attorneys for Appellees.